

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9**

MASSEY ENERGY COMPANY AND ITS  
SUBSIDIARY, SPARTAN MINING COMPANY  
D/B/A MAMMOTH COAL COMPANY

and

Case 9-CA-42057

UNITED MINE WORKERS OF AMERICA

**RESPONSE BRIEF OF RESPONDENT SPARTAN MINING COMPANY D/B/A  
MAMMOTH COAL COMPANY REGARDING SINGLE EMPLOYER ISSUE**

In its brief, counsel for the General Counsel concedes that, the single employer issue was never alleged in any of the Complaints filed against Mammoth or Massey. (General Counsel's Brief, p. 2). He does not dispute, moreover, that the issue of whether upon any theory, the Respondents can be held responsible for the acts of the other is significant in this case. Moreover, he never denies that the words "single employer" never appear in the Complaints (indeed, they nor their components "common management," "integration of operations," or "common control of labor relations" never appear in the whole record). Counsel for the General Counsel, however, argues, along with the Charging Party, that the Respondents should somehow have deduced that the single employer theory was at issue because the Amended Complaint alleged that the two companies were agents of one another. To allow the Board to consider a never before alleged, much less articulated, theory of liability after the record was closed would grossly violate the Respondents' due process rights, and would constitute a grave miscarriage of justice.

It is well-settled that the Board cannot rule on issues raised for the first time post-hearing because to do so would violate the respondent's constitutional right to due process. *See Quality*

*CATV*, 289 NLRB at 648<sup>1</sup>. Yet this is exactly what the counsel for the General Counsel and the Charging Party want the Board to do. Counsel for the General Counsel attempts to subvert this long-standing rule by arguing that Respondents were essentially on notice that they needed to offer evidence and arguments concerning single employer status because he alleged that the companies were agents of one another. Agency was the sole theory alleged in the Amended Complaint, and therefore was fully litigated, and briefed.

The single employer theory, however, was not. It is well-settled that agency and single employer are two distinct theories, and require different types of evidence to prove. Despite counsel for the General Counsel's revisionist assertions that Respondents were on notice, the record clearly demonstrates that the single employer theory was not addressed at the hearing, and at no time was the issue "vigorously" argued at trial (in fact, Respondent Massey pointed out in its post-hearing brief that the General Counsel failed to allege the single employer theory in this matter). Only once was it even mentioned—in General Counsel's post-hearing brief to the ALJ, and the General Counsel failed to raise it in any of its exceptions, or brief to the Board. The ALJ did not consider it. Based on the Amended Complaint, the hearing, and the briefing, Mammoth defended itself against the allegations made, and did not introduce evidence to combat the single employer theory. To now allow consideration of the issue deprives Mammoth of its due process rights to defend itself.

Additionally, counsel for the General Counsel argues that Respondents' due process rights are protected because of his motion at the end of the hearing to amend the Complaint to conform to the evidence. (Tr. 3810-3812, attached as Exhibit 4 to Charging Party's Brief). According to

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<sup>1</sup> Unlike the issue presented in *Pay Less Drug Stores Northwest*, 312 NLRB 972 (1993), a decision denied enforcement by the Ninth Circuit,<sup>1</sup> the General Counsel in the present case did not seek to preserve a fully litigated alternate theory of liability, namely, that of single employer status. In *Pay Less*, the Board found that the General Counsel's fully litigated alternative theory was preserved when the administrative law judge was asked to and failed to rule on that alternate theory. The Board specifically noted that the alternative theory was presented at the hearing, evidence was adduced – and then the theory was addressed in the post-hearing briefs and argued "vigorously" by both parties in supplemental briefs. *Pay Less*, 312 NLRB at 973. That did not happen here.

counsel for the General Counsel, this essentially “fixes” anything he forgot to allege in the Complaint and puts the Respondents on notice that he now alleges against Respondents any legal theories contained in any testimony, exhibits, or any arguments made during a 16 day trial, even if the legal concept of single employer was never alleged or used. Not only is this a ridiculous proposition, the record itself establishes that motion was, in fact, never ruled upon. Judge Bogas actually deferred his ruling, and in fact, never ruled on the motion, because the General Counsel could not articulate a specific amendment he wanted to make other than to correct the spelling of names:

Ms. Vaughan: Okay. Thank you. And finally, I was going to make a standard motion to conform the pleadings to the proof of our case.

Mr. Donnelly: No objection.

Ms. Vaughan: I’m always afraid that I’m going to get that wrong, because I was present one time when a counsel moved to amend to move the proof to the pleadings to conform with the pleadings, and I’m always – I’m always afraid I’ll get that wrong.

But I move to conform the pleadings to the proof.

Mr. Roles: Well, I don’t – I would – I believe any motion to amend the pleadings would be more specific than that. And in the absence of a specific statement, I object.

...  
Judge Borgas: I know that these are pretty standard, but it’s a – it’s a pretty big record and there’s a lot in there.

I – I’ll defer a ruling on the motion to conform the pleadings to the proof at – at – you know, and if you have some specific things.

...  
Ms. Vaughan: I – and just in case there are some spellings I missed, or, you know, some names...

(Administrative Hearing Transcript at 3010 to 3012.) Counsel for Mammoth objected to any motion, unless it was simply to correct mistakes in the transcript. There is nothing in this motion which in any way gives notice that the single employer issue is involved.

As argued by Massey in its brief, the parties to this case were intimately aware through intense experience with the single employer doctrine as applied in the coal industry. So were their counsel. See Forrest H. Roles, *Unique Nature of the Coal Industry – Are the Labor Law Rules Determining When Two Employers Should be Treated As One Different for the Coal Industry?*, 97 W.Va. Law Rev. 985 (1995), treating the single employer doctrine as applied in the coal industry. The issue of the application of single employer to the coal mining industry was controversial, and the parties and their counsel had often dealt with it, and were aware of the evidence needed to resolve it. In these circumstances, the fact that single employer was neither alleged or even referred to during a 16-day trial is particularly telling. No one knew or was put on any notice that it was present, much less being tried.

Simply put, fairness and equity dictate that the Board render its ultimate decision in this case without consideration of the single employer issue. The General Counsel did not raise the issue of single employer at any point in these proceedings, from the Complaint to the cross exceptions, to the answers to Massey's exceptions, and briefing to the Board. At the time it amended the Complaint, the General Counsel, if he had deemed it appropriate to do so, could have alleged that Mammoth and Massey were a single employer. He obviously chose not to. At any time before the hearing began, the General Counsel could have amended his Complaint to allege single employer. He chose not to. Again, during the months the hearing took place, the General Counsel could have sought to amend his Complaint to allege single employer. He chose not to. Nor did he make any mention of a single employer theory during the hearing. Even when the parties were arguing over the admissibility of a picture of a sign at Mammoth containing a Massey "M" logo, the General Counsel argued only that the sign was evidence of agency – not that a single employer relationship existed. (Tr. 158-159). As a result, Mammoth had no notice the issue was present and did nothing to litigate it.

If the Board decides, at this juncture, to address the single employer theory, it will greatly impact this case and the decision made by the Board on the substantive allegations and defenses. The entire case, not just this issue, would have been tried and briefed differently had the single employer allegation been made. To add such an alternative theory now would be a grave injustice and constitute error. Therefore, even if the Board concludes that it has discretion in deciding whether to address the single employer issue, it should decline for all of the reasons set forth in Respondents' briefing, and responses.

SPARTAN MINING COMPANY D/B/A  
MAMMOTH COAL COMPANY



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**CERTIFICATE OF SERVICE**

I, Forrest H. Roles, counsel for Spartan Mining Company, d/b/a Mammoth Coal Company, do hereby certify that I have filed a true and exact copy of the foregoing *Response Brief of Spartan Mining Company d/b/a Mammoth Coal Company's Brief Regarding Single Employer Issue* through the National Labor Relations Board's E-filing system at <http://www.nlr.gov>, this 3rd day of May, 2011, and that a true and exact copy of *Response Brief of Spartan Mining Company d/b/a Mammoth Coal Company's Brief Regarding Single Employer Issue* has been served via electronic mail and regular U.S. mail, postage prepaid to the following this 3rd day of May, 2011:

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